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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL. L.P. 294/2017**

% *Date of Judgment: 5th September, 2017*

STATE (NCT OF DELHI) Petitioner
Through: Ms.Radhika Kolluru, Advocate for the
State along with Inspector Yogesh,
SHO P.S. Khajuri Khas and ASI
Jaiveer

versus

PRAKASH CHANDRA PANDEY Respondent
Through: Ms. Sandhya Gupta, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

CRL. M. A. 8149/2017

1. This is an application seeking condonation of 79 days delay in filing the present leave to appeal. The grounds for the delay are set out in paras 2 to 4 of this application. Counsel for the applicant submits that the delay is not on account of inaction or negligence, but for the reasons so explained.
2. This application is vehemently opposed by the counsel for the respondent. She submits that the application lacks material particulars; it is stereo-typed and does not specifically explain the delay in filing the leave petition.
3. We have heard the learned counsel for the parties. We find that the grounds set out in this application are stereo-typed and do not raise

any sufficient grounds to condone the delay. However, since we have heard the matter on merits as well, we condone the delay.

4. The application stands disposed of.

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5. The present leave to appeal has been filed by the State under Section 378 (1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against the impugned judgment dated 24.11.2016 passed in Sessions Case No. 44980/2015 arising out of the FIR No. 1363/2014 registered at Police Station Khajuri Khas under Section 376 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 6 of POCSO Act, by virtue of which the respondent has been acquitted.
6. The case of the prosecution as noticed by the Trial Court is that on 11.12.2014, the complainant Smt. Anita went to the Police Station Khajuri Khas and lodged a complaint that she was residing with her family at House No. 29, Gali No.3, Bihari Pur Extension, Delhi. Approximately one month prior to the incident, she had started the tuition of her daughter, the victim, a minor girl aged about 07 years with Prakash Chandra Pandey (respondent herein), residing in her street. On 11.12.2014, the victim told her that on 29.11.2014, at about 5:30 P.M., she had gone for her tuition and at about 5:45 P.M., she had gone for urination after taking permission from her tutor Prakash. The respondent inserted his finger into her urinating organ and threatened that if she disclosed his acts to anyone, he would punish the victim. On the basis of the complaint, a case was registered for the offences punishable under Sections 376 IPC and Section 6 of the POCSO Act.

Thereafter, the victim was produced before the learned Metropolitan Magistrate, Karkardooma Courts where her statement under Section 164 of Cr.P.C. was recorded. The victim was medically examined by the Doctor. The respondent was arrested and was medically examined. After completion of investigation, chargesheet was filed against the respondent for the offences punishable under Section 376 of IPC and Section 6 of POCSO Act. On 18.02.2015, a charge against the respondent was framed for the said offences, to which he pleaded not guilty and claimed to be tried.

7. To bring home the guilt of the respondent, the prosecution examined as many as 9 witnesses. The statement of the respondent was recorded under Section 313 of Cr.P.C whereby he stated that he was falsely implicated in the present case. The mother of the victim had to pay tuition fees for the last four months from the date of incident and her husband came to his house and met his mother Lakshmi and had some altercations with her, whereupon he threatened her with dire consequences. The present false case was registered by the father of the victim. As to the time of the incident, the respondent categorically stated that the tuition timings of the victim were between 3-4 pm. The respondent examined 2 witnesses in his defence.
8. Ms. Radhika Kolluru, learned counsel for the State submits that the impugned judgment of the learned Trial Court suffers from surmises and is perverse. The learned Trial Court has fallen in error and not appreciated the testimony of the child victim, which has been consistent. The child has described the incident in her statement under Section 161 and 164 of Cr.P.C. and the testimony in Court. She

further submits that it has been repeatedly held by the Supreme Court of India that an order of conviction can be based on the sole testimony of a victim. She also relies on the testimony of Smt. Anita (PW-4) mother of the victim to show that the incident was reported to the police. Learned counsel also submits that the learned Trial Court has failed to take into consideration the MLC of the victim dated 12.12.2014 and the testimony of Dr. Neelu Singh (PW-9) who proved the MLC Ex.PW-9/A of the victim. Learned counsel contends that the MLC of the victim has revealed that the hymen of the victim was torn with congestion around the area of the hymen. The Doctor had also opined that the tear was fresh. Learned counsel submits that the delay in lodging the complaint has been specifically explained as it is well-known that the parents are hesitant in making complaint of such a nature specially having regard to the status of the victim and her family.

9. Ms. Sandhya Gupta, learned counsel appearing on behalf of the respondent submits that there is no infirmity in the judgment passed by the learned Trial Court. She submits that it is a well-reasoned judgment and the learned Trial Court has very carefully examined the complaint lodged by the mother of the victim and rejected the same on the ground of delay which was unexplained. She submits that the medical opinion is, in fact, to the benefit of the respondent as according to Dr. Neelu Singh (PW-9), the injury on the victim was fresh. However, the examination was done after a gap of 13 days, during which period any injury would have healed by the said date. She has also placed strong reliance on the testimony of the victim,

who has deposed that she had informed her mother and brother on the same date. This fact is also evident from reading of the evidence of the mother. She further submits that none of the children who were present at the tuition centre were examined as in case the tutor, respondent was missing from the class, it would have gone a long way to lend corroboration to the statement made by the victim. She further submits that even the father of the victim, who had made the complaint in his hand-writing was not examined as a witness. Learned counsel for the respondent submits that the respondent was 22 years of age at the relevant time, he was giving tuitions and, in fact, DW-1 P.S. Bhandari, the grand-father of another child, who was coming for tuition has testified in support of the respondent.

10. We have heard the learned counsel for the parties and considered their rival submissions.
11. The submissions of the learned counsel for the State can be summarized as under:
 - (i) The delay in lodging the FIR has been specifically explained;
 - (ii) The statement of the victim is consistent;
 - (iii) The MLC suggests the fresh tear of hymen; and
 - (iv) Conviction can be based on the sole testimony of the victim;
12. The arguments of learned counsel for the respondent can be summarized as under:
 - (i) The testimony of the victim is based on tutoring;
 - (ii) That the material witnesses were not examined;

- (iii) As per the MLC, the tear was fresh, whereas the MLC was conducted after 13 days from the date of the incident and in that case the injury would have healed by then;
 - (iv) It would be highly unsafe to convict the respondent on the basis of the sole testimony of the victim, which has not been corroborated by any other form; and
 - (v) The respondent was falsely implicated as he had demanded his tuition fee which was due for 4 months.
13. As far as delay in lodging the FIR is concerned, it has been repeatedly held that in cases of such a nature, parents are reluctant to approach the police and thus, in our view, the delay of 12 days cannot be a ground by itself to acquit the respondent. At this stage, we deem it appropriate to examine the testimonies of three most important witnesses in this regard, namely, the victim (PW-2), her mother Smt. Anita (PW-4) and Dr. Neelu Singh (PW-9).
14. PW-2 the victim, aged about 7 years at the time of her deposition testified in her examination-in-chief that she used to take tuitions from Prakash Chandra Pandey (respondent herein). At that time, she was studying in 3rd standard. She did not remember the date of the incident, but she deposed that it was evening and had gone to take tuitions at the house of the respondent. At that time, she went for urinating by taking permission from the respondent. The respondent followed her into the washroom and inserted his finger into her urinating place. The respondent also threatened her that if she would disclose to anyone, then he would make her sit like a cock for the whole day. On returning back to her home, she narrated the entire

facts to her mother. She was taken to the Hospital by the police and was medically examined. Her statement was also recorded at Karkardooma Courts before the learned Judge. PW-2 categorically identified the respondent in Court.

15. In her cross-examination, PW-2 stated that she was taking tuitions from the respondent about one month prior to the date of the incident. The respondent had never committed such an act before the date of the incident. There were five other students who were taking tuitions at the time of the incident. It was voluntarily stated by her that other five students were on the terrace and she had gone downstairs. PW-2 further stated that she narrated this incident first to her brother, who was in 4th standard at the time of the incident and thereafter disclosed to her mother.
16. PW-4 Anita (mother of the victim) deposed in her examination-in-chief that at the time of the incident, her daughter was in 2nd standard and was taking tuitions from the respondent who was her neighbour. The respondent was duly identified by her in Court. PW-4 deposed that her daughter was going for taking tuitions from the respondent one month prior to the date of incident. On 29.11.2014, at about 5:45 P.M., her daughter after returning home from tuitions informed her that during tuitions with the respondent, she went to the washroom after taking permission from the respondent and he followed her in the washroom and put his finger in her private parts from where she urinates. The victim further informed her that the respondent had threatened her not to disclose this incident to anyone otherwise he will beat her and punish her. Thereafter, PW-4 along with her husband and

the victim went to the Police Station and reported the matter to the police. She gave a written complaint to the police which was proved as Ex.PW-4/A. Police made inquiries from the victim and took her to the hospital for medical examination. Police also took her daughter to Karkardooma Courts for recording her statement.

17. In her cross-examination, PW-4 stated that at the time of the incident her husband was posted in Delhi in CRPF. PW-4 further stated that complaint which is Ex.PW-4/A is not in her handwriting. It was voluntarily stated by her that the same was in the handwriting of her husband. It is worthwhile to mention that PW-4 had stated that the victim narrated the said incident to her after about 2-3 days. PW-4 denied the suggestion that her husband had gone to the house of the respondent where he met his mother (Laxmi) and had some altercation with her whereupon the husband of PW-4 threatened Laxmi of dire consequences.
18. PW-9 Dr. Neelu Singh proved the MLC of the victim which was made by Dr. Sweta Jain as she had left the Hospital. As per the MLC, the victim was brought to the Hospital on 12.12.2014, at about 10:40 P.M with alleged history of complaining about insertion of finger in and around her private parts on 29.11.2014 at around 5:00 P.M. in the evening by her tuition teacher (respondent herein). The history of the victim further revealed that the victim informed the same to her parents on 11.12.2014 at about 6:00 P.M. after she had repeatedly avoided going to her tuitions which made her parents to find out the reason for the same. As per the MLC, hymen was found torn and the area around hymen was congested and the vagina admits little finger.

19. PW-9 in her cross-examination could not opine as to whether the tear in the hymen was old or fresh as she was not present at the time of the examination of the victim. It was voluntarily stated by her that since the MLC shows that the vagina admitted little finger and the hymen was found to be congested therefore, she could opine that it was a fresh tear. PW-9 admitted the suggestion given to her that it was not mentioned in the MLC if it was a fresh or an old injury.
20. Undoubtedly, there is no bar in law to convict the accused on the basis of the sole testimony of the prosecutrix, however, the same is only permissible if the testimony is of sterling quality and inspiring confidence. We may notice a judgment of a coordinate bench of this Court, of which one of us (G. S. Sistani, J.) was a member, in ***State v. Wasim & Anr***, reported at ***2017 SCC OnLine Del 8502***, had while finding the testimony of the prosecutrix therein could not be relied upon, observed as under:

“19. ...Even though there is no quarrel with the proposition that conviction can be based on the sole testimony of the prosecutrix but at the same time, it must be unimpeachable and beyond reproach precluding any shadow of doubt over her veracity. We may only refer to few pronouncements of the Apex Court in this regard. In Ramdas v. State of Maharashtra, (2007) 2 SCC 170, it was held as under:

“23. It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on

the basis of her testimony. In the instant case we do not find her evidence to be of such quality.

...

25. *In the instant case there are two eyewitnesses who have been examined to prove the case of the prosecution. We have rejected outright the evidence of PW 5. We have also critically scrutinised the evidence of the prosecutrix, PW 2. She does not appear to us to be a witness of sterling quality on whose sole testimony a conviction can be sustained. She has tried to conceal facts from the court which were relevant by not deposing about the earlier first information report lodged by her, which is proved to have been recorded at the police station. She has deviated from the case narrated in the first information report solely with a view to avoid the burden of explaining for the earlier report made by her relating to a non-cognizable offence. Her evidence on the question of delay in lodging the report is unsatisfactory and if her deposition is taken as it is, the inordinate delay in lodging the report remains unexplained. Considered in the light of an earlier report made by her in relation to a non-cognizable offence, the second report lodged by her after a few days raises suspicion as to its truthfulness.*

(Emphasis Supplied)

20. *The Supreme Court in State of Rajasthan v. Babu Meena, (2013) 4 SCC 206, has observed as under:*

“9. We do not have the slightest hesitation in accepting the broad submission of Mr. Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly

reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.”

21. We may also note the following observations in Mohd. Ali v. State of U.P., (2015) 7 SCC 272:

“29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the

evidence of the prosecutrix is not of such quality which can be placed reliance upon.

30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unimpeachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant- accused for the alleged offences and the High Court has fallen into error, without reappreciating the material on record, by giving the stamp of approval to the same.

(Emphasis Supplied)

21. On careful reading of the testimony of PW-4 Smt. Anita (mother of the victim) would show that the victim had informed her on the date of the incident itself. However, what emerges from her cross-examination that the victim had narrated the said incident to her after about 2-3 days of the occurrence.
22. As we have noticed hereinabove that the delay in lodging the FIR after 12 days of the incident is also explained. We find it that although the parents may be reluctant to rush and lodge an FIR, but we do not find any justifiable reason for the mother to have allowed her daughter to go for tuitions after the incident. This we say so in view of the testimony of mother (PW-4) that the daughter was reluctant to go for her tuitions thereof. We are of the view that the testimony of the

victim would require corroboration in the facts of this case. Although, we hasten to add that in the case of *Mohd. Iqbal v. State of Jharkhand*, reported at (2013) 14 SCC 481, the Hon'ble Supreme Court of India had observed that testimony of a victim can be the sole basis for conviction provided that the testimony is of sterling quality, just, reliable and trustworthy. The testimony of Dr. Neelu Singh (PW-9) which we have reproduced above, the MLC and the other evidence would also show that the tear was fresh. We do not see the reasoning of the learned Trial Court to be perverse that in case the tear was 13-14 days old, it would be healed by that time. Thus, the tear of the hymen cannot be an incriminating circumstance against the respondent. Also, the learned Trial Court has considered the testimony of the Doctor in the right perspective.

23. In our view, the learned Trial Court has carefully examined the evidence on record. The learned Trial Court has also considered the fact that none of the children of the tuition centre were examined
24. Even otherwise, it is settled law that the Appellate Court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See *Sheo Swarup v. King-Emperor*, AIR 1934 PC 227 (2); *M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200 (paragraph 16 and 17); *Tota Singh and Anr. v. State of Punjab*, AIR 1987 SC 108: (1987) 2 SCC 529 (paragraph 6); *State of Rajasthan v. Raja Ram*, (2003) 8 SCC 180 (paragraph 7); *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42); *Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450 (paragraph 73);

and *Muralidhar @ Gidda v. State of Karnataka*, (2014) 5 SCC 730 (paragraph 12)].

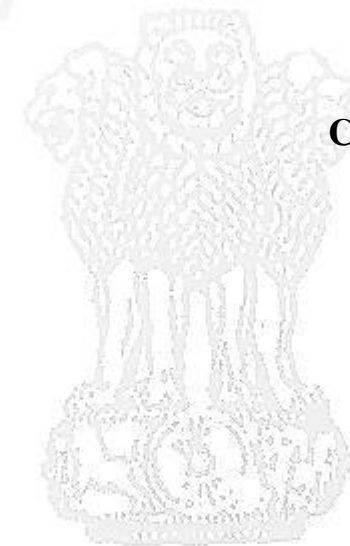
25. Accordingly, we find no illegality or infirmity in the judgment passed by the learned Trial Court warranting interference. The present leave petition is dismissed.

G.S.SISTANI, J.

CHANDER SHEKHAR, J.

SEPTEMBER 05, 2017

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